MOTION FILED

No. 02-947

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IN THE

Supreme Court of the United States

UNITED AIRLINES, INC. AND UAL CORPORATION,
Petitioners,

v.

KATSUKO HOSAKA, INDIVIDUALLY AND ON BEHALF OF THE ESTATE AND HEIRS OF SADAO HOSAKA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel

ROBERT P. WARREN
DAVID A. BERG
Air Transport Association
of America, Inc.
1301 Pennsylvania Avenue, N.W.
Suite # 1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W., #600
Washington, D.C. 20006
(202) 585-6900

JORDAN B. CHERRICK
SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

Attorneys for Amicus Curiae Air Transport Association of America, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Air Transport Association of America, Inc. ("ATA") respectfully moves to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit. Counsel for Petitioners have given their consent for the ATA to file this brief, and verification of that consent has been filed with the Court. The consent of counsel for Respondents was requested and refused. This Court has previously granted another motion of the ATA for leave to file a brief *amicus curiae* in support of certiorari on another important case involving the Warsaw Convention. *See El Al Israel Airlines, Ltd. v. Tseng*, 523 U.S. 1117 (1998).

The interest of the ATA in this case stems from the fact that its member airlines consider this case to present issues of national and international importance. As set forth more fully in the attached brief, the decision below will deprive airlines of a valuable procedural tool to compensate passengers efficiently for their actual losses. The holding of the Court of Appeals contradicts the views of the United States on the operation of the Warsaw Convention and could interfere with ongoing efforts to obtain acceptance of a recently negotiated treaty that updates the Convention's liability rules.

Respectfully submitted,

Of Counsel

ROBERT P. WARREN
DAVID A. BERG
Air Transport Association
of America, Inc.
1301 Pennsylvania Avenue, N.W.,
1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W., #600
Washington, D.C. 20006
(202) 585-6900

JORDAN B. CHERRICK
SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

Attorneys for Amicus Curiae
Air Transport Association of
America, Inc.

January 21, 2003

QUESTION PRESENTED FOR REVIEW

In the case of international transportation of persons performed by aircraft for hire, any action seeking to recover damages for bodily injuries suffered as a result of an accident on board an aircraft, or in the course of any of the operations of embarking or disembarking, is governed exclusively by the Warsaw Convention. The question presented in this case is:

> Whether the application of the doctrine of *forum non conveniens* is prohibited in cases governed by the Warsaw Convention?

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Air Transport Association of America, Inc. ("ATA"), as *amicus curiae*, supports the Petition of United Airlines, Inc. and UAL Corporation for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. Petitioner United Airlines, Inc., however, is a dues-paying member of the ATA.

INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The ATA is an association of 22 U.S. and five foreign airlines.[2] The ATA's U.S. members operate within the United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and advocating common industry positions on important policy and legal issues. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of airlines with respect to the operation of the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention.[3]

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[2] The ATA's member airlines are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: Aerovías de México, Air Canada, Air Jamaica, KLM-Royal Dutch Airlines, and Mexicana de Aviación.

[3] The international air carrier liability regime comprises three basic documents at this writing: (1) The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note (2000) (hereafter "Warsaw Convention" or "Convention"); (2) The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, S. Treaty Doc. 107-14 ("The Hague Protocol"); (3) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as amended by

First, the decision below will deprive airlines of a valuable procedural tool to compensate passengers efficiently for their actual losses.

Second, it will make it more difficult to obtain a consensus among airlines to support the 1999 Montreal Convention,[4] a new treaty that, upon its entry into force, will supersede the Warsaw Convention and codify the airlines' contractual waivers of their liability limits under the Warsaw Convention.

Finally, the Warsaw Convention's overriding goal of uniformity cannot be preserved if the municipal courts of a Contracting Party are allowed to alter substantially the operation of the Convention, established over decades of consistent practice by that Party, based on such courts' reinterpretation of what the original drafters may have intended in 1929. The decision below improperly distinguishes between common law principles, on the one hand, and civil law principles, on the other, with respect to their compatibility with the Warsaw Convention and therefore threatens to undermine the universality of the Warsaw system.

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the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, *reprinted in* S. EXEC. REP. NO. 105-20, at 21-32 (1998). The United States has formally ratified documents 1 and 3, the original Warsaw Convention and Montreal Protocol No. 4. Montreal Protocol No. 4 entered into force for the United States on March 4, 1999. The Hague Protocol is pending before the Senate for its advice and concent to ratification.

[4] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 (hereinafter "Montreal Convention"). The complete text of the Montreal Convention is included in Appendix A hereto.

STATEMENT OF THE CASE

This consolidated action was commenced by 46 passengers who claimed to have been injured aboard a United Airlines flight from Tokyo, Japan to Honolulu, Hawaii on December 28, 1997. The plaintiffs filed this action against Petitioners United Airlines, Inc. and UAL Corporation (together, "United Airlines") in the United States District Court for the Northern District of California, although that District is devoid of any connection with the plaintiffs, their alleged injuries, their claimed treatment or their purported losses. Every single plaintiff lives in Japan, works in Japan, is a citizen of Japan, received medical care (if at all) in Japan and sustained all other damages claimed in Japan. All records relating to the plaintiffs' alleged accident-related injuries and damages are in Japanese and are located in Japan.

Because these lawsuits involve injuries that the plaintiffs allegedly sustained in the course of international transportation by air, the governing principles are those set forth in the Warsaw Convention, as modified by certain private contractual undertakings, as well as tariffs filed with the U.S. Department of Transportation. *See* Petitioners' App. B at 36a. The particular contractual undertakings of relevance are the IATA Intercarrier Agreement and the Agreement on Measures to Implement the IATA Intercarrier Agreement. *See id.* The Warsaw Convention, as modified by the contractual agreements, provides for a presumption of liability. *See, e.g., Insurance Co. of N. Am. v. Federal Express Corp.*, 189 F.3d 914, 917 (9th Cir. 1999). Thus, the only relevant evidence that would be presented by the plaintiffs at a trial on the merits of these cases is located in Japan, and would be presented in Japanese.

Because of this utter lack of connection to the District where these cases were filed, United Airlines moved to dismiss the cases on the grounds of *forum non conveniens*. In

two separate orders which together embraced all of the related lawsuits, the District Court properly applied the private and public interest factors set out by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and its progeny, and conditionally ordered that the cases be dismissed. *See generally* Petitioners' App. B and App. C. The District Court ultimately concluded that "[o]verall, the balance of private interest factors central to the Court's inquiry . . . clearly weigh in favor of Japan as the forum for this suit." Pets. App. C at 65a-66a. The District Court also found that the public interest factors favored Japan as the proper forum. *See id.* The District Court therefore properly ordered that the cases be dismissed in favor of more convenient fora available in Japan.

Plaintiffs appealed those dismissal orders to the United States Court of Appeals for the Ninth Circuit, and the appeals were consolidated. *See Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 n.2 (9th Cir. 2002), Petitioners' App. A at 1a-32a. Plaintiffs argued that the District Court abused its discretion in entertaining United Airlines' *forum non conveniens* dismissal motions because, in their view, that well-established procedural doctrine was not available to airline defendants in cases governed by the Warsaw Convention.

The Ninth Circuit agreed with the plaintiffs that the doctrine of *forum non conveniens* is incompatible with the intent of the Contracting Parties to the Convention.[5] *See*

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[5] The Ninth Circuit cited the U.K. Court of Appeals case *Milor SLR v. British Airways PLC*, [1996] Q.B. 702 (U.K.) as support for its decision. The Ninth Circuit, however, did not agree with the rationale and decision in *Milor*. The *Milor* Court concluded that the text of the Warsaw Convention precluded the application of *forum non conveniens*. *See id.* at 706. The Ninth Circuit disagreed with that finding, concluding that the textual interpretation adopted by the United States District Court for the Southern District of New York in *In re Air Crash Off Long Island, New*

Hosaka, 305 F.3d at 1003-04, Pets. App. A at 31a-32a. In doing so, it reached a decision that is contrary to numerous decisions from other federal courts in this country[6] and expressly rejected the informed reasoning of the Fifth Circuit in *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

United Airlines' timely Petition for a Writ of Certiorari from this Court followed.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to review the question of whether the Warsaw Convention precludes the application of the doctrine of *forum non conveniens* by the

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York, on July 17, 1996, 65 F. Supp. 2d 207, 214 (S.D.N.Y.1999) that the plain text allows for the use of *forum non conveniens* was equally plausible. Instead, the Ninth Circuit principally applied its interpretation of the drafting history of the Convention to conclude that *forum non conveniens* was not available in an American court. *See Hosaka*, 305 F.3d at 997-99, Pets. App. A at 17a-21a.

The Ninth Circuit also failed to consider the decision from the Singapore Court of Appeals in *Brinkerhoff Maritime Drilling Corp. v. P.T. Airfast Services Indonesia*, 1992-2 SLR 776, 1992 SLR LEXIS 453 (Singapore Jul. 2, 1992), which recognized and applied the doctrine of *forum non conveniens* in a passenger injury case brought under the Warsaw Convention.

[6] The case law the Ninth Circuit found to be erroneously decided includes: *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *Coyle v. P.T. Garuda Indonesia*, 180 F. Supp. 2d 1160 (D. Or. 2001); *In re Air Crash off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999); *Robert Bosch Corp. v. Air France*, 712 F. Supp. 688, 691 (N.D. Ill. 1989); *Intel Corp. v. Malaysian Airline Sys.*, 652 F. Supp. 1101, 1102 (N.D. Cal. 1987).

courts of the United States as a procedural tool. As Petitioners explain, review is warranted because the decision of the Court of Appeals here conflicts directly with the decision of the United States Court of Appeals for the Fifth Circuit *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987) and the decision of the Second Circuit in *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). We will not repeat Petitioners' arguments here.

Review is also warranted because this case presents an important question of interpretation of federal law that this Court has not decided. The Court of Appeals' holding that the Warsaw Convention precludes the application of the common law doctrine of *forum non conveniens* is a judicial effort to rewrite the rules of this treaty nearly 70 years after it entered into force for the United States, even though it concedes that the plain language of the Convention does not compel that result. Moreover, it contradicts directly the position taken by the United States at the 1999 diplomatic conference to draft the Montreal Convention to supersede the Warsaw Convention. The ATA and its members rely upon the position of the United States that the doctrine of *forum non conveniens* is available in cases under the Warsaw Convention and would continue to be available when superseded by the Montreal Convention. The Montreal Convention is currently awaiting Senate advice and consent to ratification.

This Court has affirmed that the Warsaw Convention provides the exclusive means of passenger redress for personal injury and death sustained in international air transportation. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999). By declaring the doctrine of *forum non conveniens* incompatible with the Convention's rules, the decision below takes the principle of the Convention's exclusivity too far. If left undisturbed, the decision of the court below would create

precedent for the erroneous proposition that the Convention precludes the application of common law principles not specifically codified by its rules. Such a result would have significant adverse repercussions for U.S. airlines in international air transportation.

1. Contrary to the view of the court below, the plain language of the Warsaw Convention defers to national law on all questions of procedure. Article 28(2) specifically provides:

> Questions of procedure shall be governed by the law of the court to which the case has been submitted.

Therefore, unless the court below concluded that there is some other provision of the Convention that directly precludes the application of the doctrine of *forum non conveniens*, or that the application of the doctrine is not a question of procedure, its holding contradicts the plain language of the Convention and is in error. The court below reached neither conclusion.

There can be no legitimate distinction, as the court below asserts, between procedures employed by courts in 1929, when the Convention was finalized, or even in 1934, when it entered into force for the United States, and procedures that may be currently in effect in the courts of the Contracting Parties. The purpose of the Convention is not to freeze in time the principles of national procedural law to which its rules defer.

The principles of treaty construction established by this Court in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996) for the construction of the Convention do not apply here, contrary to the opinion of the court below. In *Floyd* and *Zicherman* the Court properly looked to the state of jurisprudence as it existed at the time of the adoption of the Convention to determine the meaning of the terms used in the

Convention, such as "damages" and "bodily injury." The nature and extent of the damages recoverable under the Convention are unquestionably among its most important features. However, the application of those rules of construction in areas where the Convention specifically defers to national law, such as procedure, is misplaced.

2. The decision of the court below contradicts the views expressed by the United States in the 1999 International Conference on Air Law in Montreal ("Montreal Conference"), at which a new convention to supersede the Warsaw Convention was negotiated. A principal negotiating objective of the United States at that conference was the addition of the so-called "Fifth Jurisdiction"[7] to supplement the four bases of jurisdiction provided under Article 28(1) of the Warsaw Convention. In most cases involving the death or injury of a passenger, the "Fifth Jurisdiction" allows suit to be brought in the country of the passenger's principal and permanent residence. This addition to the liability regime for international air transportation was intended to ensure that nearly all citizens and other permanent residents of the United States have access to U.S. courts.

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[7] The court below properly found that Article 28(1) of the Warsaw Convention provides four jurisdictional choices to a plaintiff filing a lawsuit: "the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." *Hosaka*, 305 F.3d at 994, Pets. App. A at 8a-9a (quoting Warsaw Convention, art. 28(1)). At the Montreal Conference, a fifth possible jurisdiction, the domicile of the plaintiff, was added for actions for damages resulting from the death or injury of a passenger. *See* Montreal Convention, art. 33(2).

To dispel foreign government concerns about increased exposure to U.S. courts, the United States made the following statement to the conference:

> . . . the presence of a fifth jurisdiction could well result in fewer "forum shoppers" winding up in U.S. courts. With a convenient "homeland" court available to them, more non-U.S. residents will choose to sue in their "home court," rather than to bring suit in the U.S. Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction.[8]

The holding of the court below contradicts the understanding and representations of the United States that the procedural tool of *forum non conveniens* would be available in cases such as those before this Court. Further, the United States submitted to the conference a paper entitled "Two Cases Reflecting United States Law on *Forum Non Conveniens*," to explain the operation of the principle of *forum non conveniens*.[9] One case summarized there was the decision of this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

If left undisturbed, the decision of the court below may well be regarded as changing the nature of the agreement by

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[8] *See* "Legal Considerations Relating to the Fifth Jurisdiction," *The Fifth Jurisdiction* ¶ 3, *available in* II International Civil Aviation Organization, International Conference on Air Law 101 (1999). A copy of this paper is included as Appendix B hereto. The United States repeated this statement in its conference paper entitled "Two Cases Reflecting United States Law on *Forum Non Conveniens*," *available in* II International Civil Aviation Organization, International Conference on Air Law 151 (1999). A copy of that paper is included as Appendix C hereto.

[9] *See* Appendix C.

the countries participating in the Montreal Conference, and could make it more difficult to obtain widespread adherence to the Montreal Convention as a successor to the Warsaw Convention. Because the Montreal Convention codifies the airlines' waivers of their limits of liability and provides other important benefits, this result would be adverse to the interests of the United States.

3. The holding of this court in *El Al Israel Airlines, Ltd.* 525 U.S. 155, that the Convention provides the exclusive means of passenger recovery for personal injury and death sustained in inter-national transportation does not mean that the intent of its drafters can be construed to supersede national law in areas where the Convention itself defers to that law. *See Zicherman*, 516 U.S. at 225-26. Nor is there any rational support for the proposition that the "continental jurists" who drafted the Warsaw Convention meant to recognize only civil (codified) law, as opposed to common law, in referring to the "law of the court to which the case is submitted" in Article 28.[10] The same phrase is used in the very next Article to determine the method of calculating the period of limitations

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[10] The Ninth Circuit used the history of the Brussels Convention (formally called the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968) and its rejection of the doctrine of *forum non conveniens* as support for its finding that the doctrine should not apply to cases brought under the Warsaw Convention. *See Hosaka*, 305 F.3d at 1001, Pets. App. A, at 26a. The history of the Brussels Convention, which was a regional treaty that was expanded to include the United Kingdom is not relevant to the interpretation of the Warsaw Convention. The Ninth Circuit correctly found that the Brussels Convention "was first agreed to in 1968, when only civil law nations were members of the [European] Union." *Id.* This was an inapt analogy. Unlike the Brussels Convention, the Warsaw Convention was designed for wide-spread uniform adherence, including by numerous common law countries.

under the Convention.[11] The proposition that the courts of the United States cannot employ common law principles and precedent in calculating the period of limitations established by the Convention is manifestly untenable.[12] The proper operation of this enduring and universally accepted treaty system does not depend on propositions as implausible as these.

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[11] *See* Warsaw Convention, art. 29(2). The complete text of Article 29 of the Warsaw Convention provides:

> (1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.
>
> (2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

[12] Common law doctrines have long affected statute of limitations analysis in the federal court system. For example, when a statute prescribes the limitations period, the common law often controls when the statutory period begins to run. *See, e.g., Perkins-Alexander v. Sanchez*, 16 Fed. Appx. 484, 486 (7th Cir. 2001); *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 127 (1st Cir. 1987); *Wolfe v. 3M Short-Term Disability Plan*, 176 F. Supp. 2d 911, 915 (D. Minn. 2001); *Hardin v. CNA Ins. Cos.*, 103 F. Supp. 2d 1091 (S.D. Ind. 1999). Moreover, in some state jurisdictions, limitations periods themselves are established by common law principles rather than by statute. *See, e.g., Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir. 2001) (applying Alabama law); *State* ex rel. *Secretary of the Dep't of Transp. v. Regency Group, Inc.*, 598 A.2d 1123 (Del. Super. Ct. 1991).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Of Counsel

ROBERT P. WARREN
DAVID A. BERG
Air Transport Association
of America, Inc.
1301 Pennsylvania Avenue, N.W.
Suite # 1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W., #600
Washington, D.C. 20006
(202) 585-6900

JORDAN B. CHERRICK
SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

Attorneys for Amicus Curiae
Air Transport Association of
America, Inc.

January 21, 2003

APPENDICES

APPENDIX A

CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to the International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I
General Provisions

Article 1—Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2—Carriage performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II
Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3—Passengers and Baggage

1. In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4—Cargo

1. In respect of the carriage of cargo, an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5—Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

Article 6—Document Relating to the Nature of the Cargo

The consignor may be required, if necessary, to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7—Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8—Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9—Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of

this Convention including those relating to limitation of liability.

Article 10—Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 11—Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the

quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12—Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13—Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14—Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15—Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16—Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of

customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III
Liability of the Carrier and Extent of Compensation for Damage

Article 17—Death and Injury of Passengers—Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18—Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19—Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20—Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21—Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for

each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22—Limits of Liability in Relation to Delay, Baggage and Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23—Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special

Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per hilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the

State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 24—Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall

refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25—Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26—Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27—Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28—Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29—Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30—Servants, Agents—Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of

the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32—Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33—Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business

through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

Article 34—Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35—Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36—Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37—Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV
Combined Carriage

Article 38—Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V
Carriage by Air Performed by a Person other than the Contracting Carrier

Article 39—Contracting Carrier—Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person

acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40—Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41—Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42—Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43—Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44—Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45—Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the

proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46—Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47—Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48—Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI
Other Provisions

Article 49—Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 51—Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 52—Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

Chapter VII
Final Clauses

Article 53—Signature, Ratification and Entry into Force

1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to

ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8. The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 54.

Article 54—Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55—Relationship with other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

(a) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, Done at The Hague on 28

September 1955 (hereinafter called The Hague Protocol);

(c) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56—States with more than one System of Law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only

to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and

(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57—Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic,

Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and the Montreal Protocols.

APPENDIX B

INTERNATIONAL CONFERENCE ON
AIR LAW

(Montreal, 10 to 28 May 1999)

DRAFT CONVENTION FOR THE UNIFICATION
OF CERTAIN RULES
FOR INTERNATIONAL CARRIAGE BY AIR

ARTICLE 27—FIFTH JURISDICTION

(Presented by the United States of America)

INTRODUCTION

It has long been the view of the United States that passengers or their heirs who have claims against an airline resulting from an accident in international air transportation should have the right to bring suit in the courts of the State where the passenger lived. The four bases for court jurisdiction under the Warsaw Convention indirectly permit this in most cases. However, in a limited number of cases, the four jurisdictions may not include the passenger's homeland.

The U.S. believes that including the fifth jurisdiction in any new convention represents an essential element in moving forward with a revised convention.

Each State has a significant interest in ensuring that its citizens are ensured access to justice, especially in the event of a severe injury or death of a family member. However, the United States also recognizes that any airline being called in to defend litigation in a particular State should have at least a minimal presence in that State. In the spirit of compromise, and in response to concerns expressed by certain States, the United States has accepted revisions to the proposed fifth

jurisdiction such that not all citizens will be protected. Instead, only those meeting the narrower requirements of having their "principal and permanent residence" in the State will be covered. Similarly, representatives of the United States have worked cooperatively with other States to narrow the category of airlines subject to the fifth jurisdiction. The draft convention now requires an airline to have a significant presence in the particular State.

WHY A FIFTH JURISDICTION?

As an issue of fundamental fairness, the U.S. considers it essential that claimants should have the right to bring suit in the passenger's home country. Inclusion of an acceptable fifth jurisdiction provision is essential for U.S. ratification of any new convention, for the following reasons:

- Were it not for the existing Warsaw Convention limitations, the laws of many States (including the United States) would permit a claimant to bring a legal action in the passenger's home State, provided only that the air carrier has a commercial presence in that State. There is no justification for a new convention that continues to deny passengers a right which, in the absence of an international convention, many would otherwise have under the laws of their home States.

- The passenger's home State is where most claimants are located, and that country's courts would usually apply the laws and standards of recovery that would be anticipated by such passengers or claimants.

- The homeland law is the law under which the passenger's estate and insurance plans presumably were made prior to the accident, and the law under which the estate will be probated.

- Moreover, the fairness and adequacy of compensation for tort injuries depends, in large measure, on the court

system. The fifth jurisdiction ensures that claimants will be fairly treated and adequately compensated, because they can bring suit in the courts with which they are most familiar.

- Since 1929, the air transport industry has progressed from small, independent airlines offering limited point-to-point service, to large, integrated global networks. Modern air transport operations and ticketing practices pose significant challenges under the existing Warsaw jurisdictions. Inter-carrier alliances, code sharing, electronic ticketing, Internet booking, etc., all complicate the task of determining applicable jurisdictions. Addition of the fifth jurisdiction would make this task much simpler.

- Most domestic flights today carry at least a few passengers who are on connecting segments of an international itinerary. The growth in numbers and types of international air travelers, and the complexity of the airline alliances that carry them, has lead to an increase in the number of claimants for whom jurisdiction is not available in the passenger's home State under the Warsaw Convention. This change in circumstances requires a change in the jurisdictional rules under Warsaw.

- Even so, the burden on carriers posed by a fifth jurisdiction would be minimal. In any fatal accident involving a commercial passenger airline there are likely to be many other claimants from the same jurisdiction, whose actions would be brought in the homeland jurisdiction by reason of purchase of the ticket in that jurisdiction. In these cases, adding the fifth jurisdiction does not impose any material litigation burden on the defending airline.

- Furthermore, the draft convention assures that the carrier will be subject to jurisdiction only in States where it has a significant commercial presence. This further ensures that the airline will not suffer hardship in defending suits brought under the fifth jurisdiction.
- Although only a small number of claimants would benefit from the fifth jurisdiction, it would be inequitable and unjustifiable to deprive these claimants of the right to bring an action in the passenger's homeland. To so deprive them might create considerable hardship.
- The fifth jurisdiction is not new. It was included in the 1971 Guatemala City Protocol and the 1975 Montreal Protocol No. 3. Failure to include it in a new convention would therefore represent a significant step backward from advances made as long ago as 1971.

THE FIFTH JURISDICTION IS CONSISTENT WITH INTERNATIONAL LAW AND PRINCIPLES OF JURISDICTION

In the U.S. view, the legal concepts behind the fifth jurisdiction are not only a matter of fundamental fairness to passengers and claimants on their behalf, but they are also entirely consistent with the principles of international law and with principles of jurisdiction adopted by many States. We believe that the Warsaw Convention's limitations on jurisiction create inequities among victims that result, in some cases, in preventing litigants from bringing suit in the court that is most appropriate and most convenient, and, but for Warsaw, would have been a proper forum under State law.

LACK OF A FIFTH JURISDICTION HAS HARMED OUR CITIZENS

As noted above, the existing jurisdictional limitations of Warsaw conflict with domestic law in the United States and

other countries. As a consequence, the Convention has impaired the rights of citizens of these countries. We provide a few examples below:

- Following the shootdown of Korean Airlines (KAL) Flight 007 (New York to Seoul) in 1983, killing all 269 people aboard, 108 decedents' cases were litigated in U.S. courts. However, cases brought on behalf of several U.S. citizens had to be litigated in foreign jurisdictions, including Korea, Japan, and the Philippines. While a U.S. court subsequently found that KAL's actions constituted "willful misconduct," the Korean courts refused even to entertain argument on the issue of "willful misconduct," and the Japanese and Philippine courts never ruled on the question. The results for claimants in a multitude of court systems were widely disparate; inequitable recoveries even existed among citizens of the same country.

- While a number of U.S. citizens were denied access to U.S. courts in the KAL accident, other foreign nationals were allowed to pursue claims in the United States. These included families of two Taiwanese ship engineers (tickets purchased by their shipping agent in New York, though issued in Panama), and a Korean national residing in Korea (ticket prepaid in the U.S., but issued in Korea).

- Of the families of French citizens killed in the crash of Swissair Flight 111 off the coast of Canada in September 1998, at least 20 may be prevented from seeking damages in French courts, because the passengers purchased their tickets in Switzerland.

THE FIFTH JURISDICTION IS CONSISTENT WITH DOMESTIC LAW IN MANY COUNTRIES

In many countries, the absence of the fifth jurisdiction may preclude national courts from assuming jurisdiction over

cases that they otherwise could hear under national law. For example, some States provide to their citizens the right to bring suits locally on any contract to which the citizen is a party, regardless of where the contract was made or performed. Consequently, a foreigner, even if not residing or otherwise doing business in that State, may be subject to the jurisdiction of the courts of that State relative to contracts made with its citizens. Such laws are much broader than the fifth jurisdiction, as it appears in the draft convention, which does not provide homeland jurisdiction for all citizens of a State, nor does it reach all defendants.

For States having such laws, the jurisdictional limits of the Warsaw Convention would discriminate against victims of airline accidents, relative to claimants in legally analogous circumstances.

A second example of the adverse impact of Warsaw's limitations on jurisdiction would be a situation where a passenger seeks to bring, in his homeland, a claim against multiple defendants, all of whom would be subject to jurisdiction under national law. Even if the passenger were pursuing justice in the most convenient forum and all defendants had a commercial presence in the jurisdiction, the Warsaw Convention might deny jurisdiction over the airline defendant, depending on whether one of Warsaw's four tests of jurisdiction were met. Denial of jurisdiction over the airline might require the plaintiff to litigate in multiple jurisdictions. Dividing the litigation in this fashion would be both unduly burdensome and excessively expensive. The fifth jurisdiction might not resolve all such injustices, but it would eliminate the most egregious, because it would permit claimants to bring suit in what is likely the most convenient forum.

LEGAL CONSIDERATIONS RELATING TO THE FIFTH JURISDICTION

The United States contends that, in addition to the compelling policy reasons for supporting the fifth jurisdiction, there are also a number of important legal reasons for doing so.

1) Legal Precedent

We would note first that the fifth jurisdiction is based on clear precedent in the context of civil aviation. The fifth jurisdiction was incorporated into the 1971 Guatemala City Protocol and 1975 Montreal Protocol No. 3. Furthermore, there is precedent for the fifth jurisdiction even outside the context of civil aviation. A similar provision is contained in the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, December 13, 1994, 14 ILM 945.

The United States recognizes that earlier iterations of the fifth jurisdiction—the Guatemala City and Montreal Protocols—were subject to liability caps. However, we construe the recent efforts at ICAO, and the EU Regulations, as international recognition that the 1971 Guatemala City Protocol and 1975 Montreal Protocol No. 3 do not represent sufficient movement on the part of governments to address the rights of consumers. Therefore, the removal of liability limits is, perhaps, the motivating and unifying goal of the developed nations. Certainly every international agreement represents a package based on compromise, but we do not believe that eliminating one inequitable aspect of the 1929 Convention and its progeny—the liability cap—is reason to eliminate an advancement accepted by delegates at diplomatic conferences over 20 years ago.

2) Consistency With Principles of International Law

The fifth jurisdiction is consistent with general principles of international law, in that it requires significant nexus

between both parties and the forum. In aviation, even more so than with other forms of transportation, the site of the accident, for any major international airline, could be virtually anyplace in the world. The 1929 Convention recognizes this by not including the accident site as one of the permitted jurisdictions.

Two of the jurisdictions presently provided for under the Convention relate to where the airline is incorporated and where its principal place of business is located. The fifth jurisdiction, as currently proposed, would only provide for jurisdiction in fora where the airline has a significant commercial presence. Thus, the fifth jurisdiction would appear consistent with recognition in the 1929 Convention that it is appropriate to look to where the airline does business, as a basis for jurisdiction.

A third basis for jurisdiction under the 1929 Convention is the place where the passenger purchased a ticket. This jurisdiction combines a requirement that an airline do business in the forum, and that the passenger have at least a minimal connection. As proposed, the fifth jurisdiction ensures, both with respect to the airline and the passenger, contacts equal to or greater than those under the current third basis for jurisdiction. Contacts under the fifth jurisdiction would be no less than those required under the third basis for Warsaw Convention jurisdiction.

The final basis for jurisdiction under the 1929 Convention is the passenger's destination. Once again, the fifth jurisdiction would appear to have greater connection to the events causing the harm than this forum, where we are assured only that the airline exercises traffic rights, perhaps only on a code-share basis, on at least one of its operations, and the passenger chose to travel on at least one occasion. This jurisdiction assures no greater connection, on the part of the airline, than the commercial presence requirement of the

proposed fifth jurisdiction, and certainly represents a far lesser connection on the part of the passenger.

For these reasons, we conclude that the fifth jurisdiction is entirely consistent with the international legal principles underlying the original four jurisdictions and jurisdictions provided for under other international conventions.

3) "Forum Shopping"

Given the nature of the claims brought under the Warsaw Convention, States should expect that "forum shopping" will always be a potential problem. Accordingly, the Special Group draft convention has significant protections against forum shopping. The fifth jurisdiction applies only where it is the passenger's "principal and permanent residence," and then only if the carrier has a significant presence in that State. Certainly, plaintiffs, at least those with sufficient resources to exercise discretion in choosing a forum, may have marginally greater forum-shopping opportunities with five potential bases for jurisdiction, rather than four. While some consideration might be given this possibility, we believe that the far more important concern is that plaintiffs with limited resources have access to one reasonably accessible forum.

Further, the presence of a fifth jurisdiction could well result in fewer "forum shoppers" winding up in U.S. courts. With a convenient "homeland" court available to them, more non-U.S. residents will choose to sue in their "home court," rather than to bring suit in the U.S. Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction.

CONCLUSION

The United States welcomes discussion to increase understanding of the terms defining the scope of the fifth jurisdiction. The current iteration, reached through significant compromise, clearly does not provide for jurisdiction for all citizens of a State, nor does it reach all international airlines. In negotiating language for these provisions, the United States has attempted to recognize the sensitivity of these issues and the importance of broad-based support. We believe the current compromise language to be an acceptable formulation, so long as it is binding in a final convention on all States Parties and their carriers.

Hopefully, these compromises will meet the needs of the majority of States. While we expect discussion to continue over this issue, it is clear that subjecting the fifth jurisdiction to liability caps, or precluding exercise of the fifth jurisdiction until a claimant has endured long and fruitless litigation in an inconvenient jurisdiction, would not meet our fundamental objective of making justice more accessible to victims of airline accidents. Such provisions would, therefore, not be acceptable to the United States.

-END-

APPENDIX C

INTERNATIONAL CONFERENCE ON AIR LAW

(Montreal, 10 to 28 May 1999)

DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

ARTICLE 27—FIFTH JURISDICTION

TWO CASES REFLECTING UNITED STATES LAW ON *FORUM NON CONVENIENS*

(Presented by the United States of America)

In its Working Paper on "The Fifth Jurisdiction", the United States noted under Legal Considerations Relating to the Fifth Jurisdiction, paragraph 3—"Forum Shopping":

> ". . . the presence of a fifth jurisdiction could well result in fewer "forum shoppers" winding up in U.S. courts. With a convenient "homeland" court available to them, more non-U.S. residents will choose to sue in their "home court," rather than to bring suit in the U.S. Furthermore, U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a convenient homeland court is available to the plaintiff because of the fifth jurisdiction."

Set forth below are synopses of two U.S. cases: *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981) and *Nolan v. The Boeing Company*, 919 F.2d 1058 (CA 5, 1990). These cases illustrate this concept of *forum non conveniens* as applied by U.S. courts to foreign nationals suing in the United States. In these cases, jurisdiction would otherwise be available in U.S. courts, but the courts dismissed the cases on the basis of *forum non conveniens*.

SYNOPSIS:

PIPER AIRCRAFT CO. v. REYNO

454 U.S. 235 (1981)

Decision by the Supreme Court of the United States
(The highest appeals court in the United States)

Suit by Representatives of several citizens and residents of Scotland who were killed in an airplane crash in Scotland during a charter flight by a British carrier. The pilot and all of the decedents' heirs and next of kin were Scottish subjects and citizens, and investigation of the accident was conducted by British authorities. Suit was against the U.S. manufacturer of the plane and propellers. A motion to dismiss on the basis of *forum non conveniens* was granted by the District Court, but reversed on appeal. The dismissal was reinstated by the Supreme Court of the United States.

The Supreme Court held:

> Dismissal under *forum non conveniens* will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. The fact that applicable law is more favorable to the plaintiff in his chosen forum, does not defeat application of the doctrine. To permit such inconvenient cases would pose substantial practical problems, requiring that trial courts determine complex problems in conflict of laws and comparative law, and increasing the flow into American courts of litigation by foreign plaintiffs.
>
> The District Court properly decided that the presumption in favor of the plaintiff's forum choice applied with less than maximum force when the plaintiff or (as here) the real parties in interest are foreign. When the plaintiff has chosen the home forum, it is reasonable to assume

that the choice is convenient; but when the plaintiff or real parties in interest are foreign, this assumption is much less reasonable and the plaintiff's choice deserves less deference.

The District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland, a large portion of the relevant evidence being located there. The District Court also correctly concluded that the problems posed by the petitioners' inability to implead potential Scottish third-party defendants - the pilot's estate, the plane's owners, and the charter company - supported holding the trial in Scotland.

The District Court's review of the factors relating to the public interest was also reasonable. Even aside from the question whether Scottish law might be applicable in part, all other public interest factors favor trial in Scotland, which has a very strong interest in this litigation. The accident occurred there, all of the decedents were Scottish, and apart from the petitioners (appointed U.S. representatives for the purpose of the litigation), all potential parties are either Scottish or English.

SYNOPSIS:

NOLAN v. THE BOEING COMPANY

919 F. 2d 1058, 1067-70 (CA5, 1990)

Suit by U.S. appointed representatives for purposes of the suit on behalf of mainly U.K. citizens and residents (none of the decedents were U.S. citizens or residents) for death from the crash of a British Midland Airways (BMA) B 737-400 aircraft en route from London, England to Belfast, North Ireland. The aircraft was owned and maintained by BMA, a U.K. corporation. The action was brought against Boeing Company and General Electric Company (designer and manufacturer of part of the aircraft engines). The District Court dismissed the case on the basis of *forum non conveniens*. On appeal, the Federal Court of Appeals affirmed. The Court of Appeals held:

> In addressing *forum non conveniens* motions the district court must follow a two-step process. The court must first find that there is an adequate alternative forum in which to try the case. If the court finds that such a forum exists, it must then consider various private and public interest factors in determining the propriety of a *forum non conveniens* dismissal.
>
> The district court properly made these determinations. The United Kingdom—the home of most of the represented plaintiffs, the headquarters of the air carrier, and the site of the accident—constituted an adequate forum in which to resolve this dispute. Moreover, to insure "availability" of the forum, the court conditioned its dismissal order on the defendants' agreement to submit to jurisdiction in the United Kingdom.
>
> The district court then carefully evaluated the private interests of the litigants. First, it noted that although the plaintiff's choice of forum must weigh in the balance,

the choice of foreign plaintiffs merits less deference than that of American plaintiffs. In concluding that the U.K. would be the more convenient forum, the court noted the appellants' argument that the evidence regarding the design, assembly, manufacture, and testing of the aircraft is in the United States. However, the evidence regarding the crash itself and the actions of British Midland Airways—which is essential to the defendants' claim that pilot error caused the crash—is in the United Kingdom. The court also noted that (1) substantially all of the damages evidence is in the U.K.; (2) many of the witnesses, most of whom were in the U.K., were beyond the compulsory process of the federal courts; and (3) the defendants would be unable to join BMA as a third-party defendant in the U.S. federal forum. In short, the district court found that all of the private interest factors favored the United Kingdom forum.

The district court also found the public interest factors to weigh in favor of the U.K. forum. None of the more than 100 plaintiffs in these sixteen cases is a U.S. resident or citizen. The accident occurred in England and English law would most likely govern the resolution of these cases. Moreover, the district court noted that a trial could last for months and found that because the controversy had no connection whatsoever with the state of Louisiana, such onerous jury duty should not be imposed on the citizens of Louisiana.

After reviewing all of the factors and evidence considered by the district court, we conclude that the court acted neither unreasonably nor arbitrarily in dismissing these cases on the grounds of *forum non conveniens*.

The primary purpose of *forum non conveniens* is to allow a court to resist impositions upon its jurisdiction and to protect the interests of parties to the litigation by

adjudicating the claim in the most suitable and convenient forum. A forum is suitable and convenient when the entire case and all parties come within the jurisdiction of that forum.

-END-